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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY, A DIVISION OF KNIGHT NEWSPAPERS, INC., *Appellant*,

v.

PAT L. TORNILLO, JR., *Appellee*..

On Appeal from the Supreme Court of Florida

BRIEF OF AMICUS CURIAE, THE NATIONAL NEWSPAPER ASSOCIATION, IN SUPPORT OF APPELLANT

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February 28, 1974

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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BRIEF OF AMICUS CURIAE, THE NATIONAL NEWSPAPER ASSOCIATION, IN SUPPORT OF APPELLANT

The National Newspaper Association hereby respectfully submits this brief as amicus curiae in support of Appellant's Appeal from the decree of the Supreme Court of Florida (entered October 10, 1973), which held that Florida Statute Section 104.38 did not violate the First Amendment of the United States Constitution. Written consents of appellant and appellee have been obtained pursuant to the Rules of this Court and are attached hereto.

STATEMENT OF THE CASE

Amicus curiae believes that Appellant has fully and fairly stated the facts of the case and, thus, hereby adopts Apellant's statement as its own.

QUESTION PRESENTED

Whether Florida Statute Section 104.38, which establishes a compulsory right of reply (under criminal sanctions) as a condition to publishing material critical of political candidates, violates the First Amendment of the United States Constitution.

INTEREST OF AMICUS CURIAE

The National Newspaper Association (NNA) is a nonprofit trade association whose membership is composed of more than 5,500 weekly newspapers and more than 950 daily newspapers published throughout the United States. The purposes of the Association are to: (a) promote the welfare of the newspaper industry, (b) provide a medium for united efforts of newspapers and allied arts of the industry to promote the best interests and welfare of the communities in which they are located and of the country generally, (c) secure improved standards in the practice of the profession of journalism and to promote a high standard of conduct and professional ethics in the profession, and (d) to act as an educational center and a medium for the dissemination of knowledge and information as to improved methods of managing and conducting newspaper affairs.

Nationwide, the weekly newspaper circulation of an average NNA member is approximately 4,700. Membership ranges from such newspapers as the Cedaredge

Sentry, Cedaredge, Colorado (paid circulation 450) and the Madison County Post, Richmond, Kentucky (paid circulation 420) to such members as the Lerner Newspapers of Chicago (combined paid circulation in excess of 180,000) and the Wilkes Barre Sunday Independent, Wilkes Barre, Pennsylvania (paid circulation 51,400). In Florida, the state in which the instant matter arose, NNA's membership includes more than 70 of the 135 weekly newspapers in the state and more than 40 of the 52 daily newspapers published within the state. The average circulation of the weekly Association members in the State of Florida is 5,185. Generally speaking, the Association represents the smaller weekly and daily newspapers throughout the country.

In their professional capacity, members of the Association, both in Florida and nationwide are sincerely fearful of the repressive effect upon editorial freedom – and, in particular the freedom of smaller newspapers – which would result if the Florida State Supreme Court's decision is upheld. If the decision is allowed to stand, newspaper freedom and, in turn, the freedom of the public to be informed free from governmental intervention and/or suppression, will have been dealt a serious and crippling blow.

ARGUMENT

The overriding illegality in Florida's compulsory publication statute is that it permits the government to impose its will directly upon the editorial freedom of action which lies at the heart of the First Amendment, and which, indeed, it was the very purpose of the First Amendment to protect. The compulsory right of reply statute directly imposes upon a newspaper the obligation to print (or, indirectly, not to print) a particular story. As this Court has plainly recognized: "For better or for worse, editing

is what editors are for; and editing is selection and choice of material." (*Columbia Broadcasting System, Inc. v. Democratic National Committee*, ___ U.S. ___, 36 L.Ed. 2d 772 (1973)). It is precisely the "selection and choice of material" function which the Florida statute takes away from editors and substitutes therefor a governmental command.

The threat which implementation of the compulsory reply statute poses is not merely fanciful rhetoric. The threat has been immediately perceived by NNA's members, and it is this "direct censorship" aspect of the statute which is most disturbing to NNA's journalists. Subsequent to the Florida Supreme Court decision here at issue, NNA polled its members to elicit their reaction to the decision. Their overwhelming response was that the statute strips from them their most precious possession – the freedom and, indeed, the responsibility to determine the what, when and wherefore of publication. Ironically, most respondents, in the exercise of their editorial discretion, routinely allow a right of reply through letters to the editor, etc. Yet they are equally alarmed that the government should attempt to dilute that freedom through compulsory reply statutes. The editorial prerogative is far too precious to be lost through government usurpation. And such particularly is the case when the area in which the compulsory reply statute operates (i.e., commentary and criticisms upon candidates for public office) is one in which governmental intervention is to be most avoided:

> . . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1935).

Clearly the Florida statute will have a direct effect upon editorial freedom. The statute, under pain of criminal sanctions, requires that if any newspaper "assails" the personal character of a candidate, or charges said candidate "with malfeasance or misfeasance in office" or "otherwise attacks" his official record, then the newspaper must "upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type . . ." In other words, a newspaper's freedom of action to criticize political candidates can only be exercised at the risk of requiring the newspaper to open up its columns to free political advertising by the candidate whose record it criticized. In effect, the statute requires the newspaper to exercise its journalistic freedom of criticism only if it is thereafter prepared to underwrite or subsidize the cost of candidate advertising. But the Florida Supreme Court never adequately discussed or persuasively demonstrated why newspapers should be placed in the position of being forced to become a print "common carrier" merely because they questioned the public performance of a candidate during an election period.

The problem is particularly acute with respect to smaller newspapers operating with low profit margins or, indeed, operating at a loss. Publishing a newspaper (even a small weekly newspaper) is an extremely expensive operation involving a blending of a high degree of editorial and mechanical skills. In order to survive, newspapers must depend upon revenue from advertising to cover the cost of production. If, as is the case in numerous local elections (both primary and general), the field of candidates is large, a compulsory reply statute forces an editor either to open up his column free of charge to a plethora of candidates, or (which is more likely) to refrain from exercising his critical judgment with respect to candidates

for public office. This dilemma creates precisely the chilling effect on the expression of free speech which this Court has so often declared to be unconstitutional.

Nor is the problem cost alone. The statute (even if specific enough to pass constitutional muster in terms of vagueness) is, nevertheless, susceptible to varying interpretations. No editor can view with equanimity the task of engaging in lengthy argument, and most probably expensive litigation, on the meaning of such terms as whether the item in question "assailed" the character of a candidate, or charged him with "malfeasance or misfeasance" or otherwise "attacked" his official record. The judicial branch will thus be compelled to act as the determiner of the meaning of such phrases, and will begin to create a series of "official governmental" standards in the form of definitions, interpretations, etc. This is precisely the type of direct governmental intervention which the First Amendment was intended to forbid.

The Florida State Supreme Court cited this Court's opinion in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1967) in support of its decision. Yet, the Florida Supreme Court not only ignored the language in *Red Lion* limiting its holding to the broadcast media, but, moreover, totally ignored this Court's later decision in *Columbia Broadcasting System, Inc.*, which emphasized that the First Amendment could never condone government usurpation of editorial freedom and discretion even in the broadcast media. Certainly nothing in *Red Lion* or *Columbia Broadcasting* can be read to support the proposition that the print media is entitled to less protection than the broadcast media. The peculiar and unique technological limitations which might support the fairness doctrine in the broadcast media are certainly not present in the print media.

The rationale followed by the Florida Court is clothed in terms of validating an appropriate state police power to insure free elections and/or to prevent media monopoly. Indeed, the Florida Court appears to accept the theory that right of reply statutes are actually statutes in furtherance of First Amendment goals. But the claim that freedom of editorial judgment can be abridged in the name of some ostensibly worthy social purpose has been rejected by this Court in *Columbia Broadcasting System, supra*, and has been rejected by numerous courts which have considered the matter. See, *e.g., Mills v. Alabama*, 384 U.S. 214 (1966); *Associates and Aldrige Co. v. Times Mirror Co.*, 440 F.2d 133 (1971); *Chicago Joint Board, Amalgamated Clothing Workers of America, AFL-CIO v. Chicago Tribune*, 435 F.2d 470 (7th Cir., 1970), *New York Times Co. v. United States*, 403 U.S. 713 (1971). *American Civil Liberties Union, Inc. v. Jennings*, 366 F. Supp. 1041 (D.C. D.C. 1973). The goals to be achieved by, and the values embodied in, the First Amendment will not be furthered by an interpretation which strips from the First Amendment the very editorial freedom which it was meant to protect. .

CONCLUSION

NNA respectfully submits that the judgment of the Supreme Court of Florida in this case should be reversed, and Florida Statute Section 104.38 should be declared unconstitutional as violative of the First Amendment.

Respectfully submitted,

WILLIAM G. MULLEN

491 National Press Building
Washington, D.C. 20004
Telephone: 202-783-1651

Attorney for Amicus Curiae, The National Newspaper Association

February 28, 1974

CERTIFICATE OF SERVICE

I, William G. Mullen, hereby certify that I have this 28th day of February, 1974 sent by postage prepaid first class United States airmail two copies of the foregoing Brief of Amicus Curiae, The National Newspaper Association, to:

Daniel P. S. Paul, Esq.
Paul and Thompson
1300 First National Bank Building
Miami, Florida 33131

Counsel for Appellant
The Miami Herald Publishing Co.

Tobias Simpson, Esq.
1492 South Miami Avenue
Miami, Florida 33130

Counsel for Appellee
Pat L. Tornillo, Jr.

_____

William G. Mullen

APPENDIX

NATIONAL NEWSPAPER ASSOCIATION

491 National Press Bldg.
14th and F Streets, N.W.
Washington, D.C. 20004
Code 202 - 783-1651

February 14, 1974

Daniel P. S. Paul, Esquire
1300 First National Bank Building
Miami, Florida 33131

In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court No. 73-797

Dear Mr. Paul:

Pursuant to Rule 42 of the Rules of the Supreme Court, the National Newspaper Association hereby requests consent of the Miami Herald Publishing Company to the filing of a brief amicus curiae by the National Newspaper Association in the above referred case.

Your consent would be appreciated.

Sincerely,

/s/ William G. Mullen
General Counsel

WGM:vrk

Consented to: /s/ Daniel P. S. Paul
Attorney for Miami Herald Publishing Company

NATIONAL NEWSPAPER ASSOCIATION

491 National Press Bldg.
14th and F Streets, N.W.
Washington, D.C. 20004
Code 202 - 783-1651

February 14, 1974

Tobias Simon, Esquire
1492 South Miami Avenue
Miami, Florida 33130

In re: *The Miami Herald Publishing Company v. Pat L. Tornillo, Jr.*, U.S. Supreme Court Case No. 73-797

Dear Mr. Simon:

Pursuant to Rule 42 of the Rules of the Supreme Court, the National Newspaper Association hereby requests consent of Pat L. Tornillo, Jr. to the filing of a brief amicus curiae by the National Newspaper Association in the above referred case.

Your consent would be appreciated.

Sincerely,

/s/ William G. Mullen

WGM:vrk

Consented to: /s/ Tobias Simon
Attorney for Pat L. Tornillo, Jr.